STATE OF MICHIGAN

COURT OF APPEALS

RICKEY CARNEIL THOMAS, Plaintiff-Appellant,	UNPUBLISHED May 24, 2012
v	No. 303337 Oakland Circuit Court
PONTIAC CITY SCHOOL DISTRICT, Defendant-Appellee.	LC No. 2010-108941-NZ

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

In this case brought under the Whistleblowers' Protection Act (WPA), MCL 15.361, *et seq*., plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

I. FACTS & PROCEDURAL HISTORY

Plaintiff worked for defendant as a non-union substitute custodian from 2008 until he was terminated on January 15, 2010. On December 10, 2009, during after-school activities, a teacher at Pontiac High School sent a student out of the building for stealing pizza. The student attempted to re-enter the building, but was confronted by plaintiff and a coworker. Plaintiff testified at a deposition that he told the student to leave and that the teacher was going to write a "referral" on the student. According to plaintiff, the student tried to walk past him and plaintiff put his arm out and stated, "[m]an just go ahead and leave." When the student mumbled something in response, plaintiff explained that, "I didn't quite hear what he was saying. So I turned my back and that's when my coworker was standing there . . . and he grabbed the young man's arm and he was like, '[m]an, you don't want to do that.'"

Later that day, plaintiff spoke with Billie Fair, the principal of the high school to inform her that "if [the coworker] wouldn't have been there [the student] would have hit me. It was quite obvious he would have hit me." Fair held a meeting three days later on December 13, 2009, with plaintiff and the other second-shift custodians. Plaintiff was unsatisfied with Fair's response and he wrote a letter on January 14, 2010, that read as follows:

> Dear. [sic] Ms. Fair, I'm writing this letter in regards to our meeting that was suppose [sic] to take place today. Ms. Fair, you stated that you would'nt [sic] meet with the custodian staff today. Ms. Fair, you have force [sic] me to write the

> Pontiac School Board, and address my concerns. I do believe that my concerns are just as important and valueable as any other staff at Pontiac High. When it comes to being threatening [sic] by any student, I trust that you would do the right thing. Ms. Fair, you have not handle [sic] this in a timely matter this incident happen 12/10/09 and you still have not address [sic] the problem. So I will present my problem to Dr. Maridada and his official staff. Thank you for my concerns not being important.

Plaintiff testified that he signed the letter and sent carbon copies to his immediate supervisors. At some point, plaintiff also placed copies of the letter in the mailboxes of the Pontiac School Board members; however, plaintiff's deposition testimony was unclear as to when he gave the letter to the board members. Defendant terminated plaintiff's employment on January 15, 2010, the day after he wrote the letter. Plaintiff was not given any reason for the termination.

Plaintiff commenced this suit under the WPA and alleged that he was terminated in retaliation for reporting "the lack of disciplinary action on the part of [Fair]" against the student who allegedly threatened him. Plaintiff alleged that defendant violated the WPA when it terminated him for reporting a "violation or a suspected violation of a law, regulation or rule of the State of Michigan."

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). At a motion hearing, plaintiff argued that evidence showed he engaged in a protected activity under the WPA because, in his letter, he reported that Fair violated terms of the Master Agreement (MA) between defendant and the AFL-CIO Local 719. Specifically, plaintiff cited a clause in the MA which called for prompt reporting to the school board of any assault upon an employee while on the job, and for the board to provide resources to assist the employee. In a written order, the trial court rejected plaintiff's argument and granted defendant's motion. The trial court reasoned that there was no evidence that plaintiff engaged in a protected activity under the WPA where plaintiff could not show that he "reported or was about to report a violation or suspected violation of a law or regulation." With respect to defendant's alleged violation of the MA, the court reasoned that the MA was inapplicable where plaintiff failed to show that he was assaulted and where plaintiff was not a member of the union. The court also held that plaintiff failed to present evidence to establish a connection between plaintiff's letter and his subsequent discharge. Plaintiff appeals the trial court's order as of right.

II. ANALYSIS

We review a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion brought under MCR 2.116(C)(10), a court must consider the evidence submitted by the parties in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Id*. at 510.

The WPA provides protections for employees who report violations of the law, rules, or regulations in relevant part as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee . . . *reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule* promulgated pursuant to law of this state, a political subdivision of this state, or the United States *to a public body*, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362 (emphasis added).]

To establish a prima facie case under the WPA, a plaintiff has the burden to prove the following elements: "(1) the plaintiff was engaged in protected activity as defined by the [WPA], (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Shallal v Catholic Social Servs*, 455 Mich 604, 610; 566 NW2d 571 (1997).

Plaintiff contends that there was a genuine issue of fact regarding whether he engaged in protected activity. "Protected activity" under the WPA "consists of (1) *reporting to a public body a violation of a law, regulation, or rule*, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation." *Ernsting*, 274 Mich App at 510 (emphasis added). In his complaint, plaintiff alleged that he engaged in protected activity when he reported Fair's failure to take appropriate action against the student who threatened him. On appeal, plaintiff contends that Fair's inaction amounted to a "violation of a law, regulation, or rule" because Fair failed to comply with a provision of the MA which provides as follows:

> Any case of assault upon an employee as a result of carrying out the job duties during scheduled work hours shall be promptly reported to the Board or its designated representatives. The Board shall provide necessary legal counsel to advise the employee of the employee's rights and obligations with respect to such assault and shall promptly render all reasonable assistance to the employee in connection with handling of the incident by law enforcement and judicial authorities.

Plaintiff argues that Fair failed to properly adhere to this provision when he complained to her that a student threatened him. He maintains that his letter reported Fair's failure to a public body, and thus, constituted "protected activity" for purposes of the WPA.

In this case, even if we were to assume that plaintiff was assaulted and that plaintiff sent his letter to a public body the day before he was terminated, plaintiff cannot show that his letter reported a violation of a law, rule or regulation because the MA did not apply to plaintiff. The MA was a contractual agreement between defendant school district and the bargaining unit of employees represented by the AFL-CIO Local 719. Plaintiff was not a signatory to the MA because he was not part of the bargaining unit represented by the union; rather, plaintiff was a

non-union substitute custodian. As such, plaintiff had no rights under the contract and he could not enforce it against defendant. See *Kisiel v Holz*, 272 Mich App 168, 170-171; 725 NW2d 67 (2006) (noting that a third party has no rights under a contract "merely because he or she would receive a benefit from its performance or would be injured by its breach"). Accordingly, given that defendant was not obligated to abide by the MA with respect to plaintiff, plaintiff's letter did not report any violation of a law, rule or regulation when it reported defendant's failure to adhere to the agreement. Thus, plaintiff cannot show that he engaged in protected activity when he sent his letter to a public body. *Ernsting*, 274 Mich App at 510-511.

Plaintiff contends that, even though he was not a union member, the MA applied to him because his immediate supervisor instructed him to follow the MA's procedures for filing a workplace complaint. However, regardless of whether plaintiff's supervisor told him to conform to certain procedural guidelines set forth in the MA, such instruction did not elevate plaintiff to bargaining-unit status with rights under the union contract. See *Kisiel*, 272 Mich App at 171 ("[t]hird-party beneficiary status requires an express promise to act to the benefit of the third party. . . .") Here, defendant made no express promise to adhere to the MA with respect to plaintiff, and plaintiff's use of procedural guidelines in the MA did not impose any duty on defendant to adhere to the agreement.

Plaintiff also argues that defendant violated a law, rule or regulation when it failed to provide a reasonably safe workplace for its employees and that his letter reported defendant's failure to a public body. However, plaintiff fails to cite any case law or statutory authority relative to this case that would assist us in reaching this conclusion, and we decline to do so.

In sum, we find that plaintiff failed to establish a prima facie case under the WPA because there was no evidence to support that he engaged in protected activity under the WPA. *Shallal*, 455 Mich at 610; *Ernsting*, 274 Mich App at 510-511. Accordingly, the trial court properly granted defendant's motion for summary disposition on that basis and we need not address the trial court's finding with respect to the third prong of plaintiff's WPA claim.

Affirmed. No costs are awarded to either party. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello